KASHI LAW LETTER
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REAL ESTATE: MORTGAGE FORECLOSURE: STANDING: EVIDENCE: HEARSAY: BUSINESS RECORDS: LOAN PAYMENT HISTORY: FINAL JUDGMENT OF FORECLOSURE REVERSED BECAUSE BANK FAILED TO ESTABLISH THAT LOAN PAYMENT HISTORY SATISFIED BUSINESS RECORDS EXCEPTION TO HEARSAY RULE OR THAT IT HAD STANDING WHEN LAWSUIT WAS FILED

Henderson v. Deutsche Bank National Trust Company, ___ So. 3d ___, 40 Fla. L. Weekly D380 (Fla. 4th DCA February 11, 2015)

The appellate court reversed final judgment of mortgage foreclosure after a bench trial because the bank failed to establish that its loan payment history qualified under the business records exception to the hearsay rule or that it possessed standing to foreclose when the action was filed.

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APPEALS: PRESERVATION: APPELLANT FAILED TO PRESERVE ISSUE FOR APPEAL BECAUSE IT OBJECTED ON DIFFERENT BASIS IN TRIAL COURT: JURISDICTION: APPELLATE COURT MAY REVIEW ANY MATTER THAT OCCURRED BEFORE NOTICE OF APPEAL WAS FILED: NOTICE OF APPEAL OF FINAL JUDGMENT DOES NOT CREATE JURISDICTION TO REVIEW ORDERS ENTERED AFTER FINAL JUDGMENT

Kelly v. Snietka, ___ So. 3d ___, 40 Fla. L. Weekly D381 (Fla. 4th DCA February 11, 2015)

The appellate court refused to consider this appeal on the merits because the appellant objected on different grounds in the trial court. With regard to its jurisdiction, the court explained, under *Fla. R. App. P.* 9.110(h), an appellate court "may review any ruling or matter occurring *before* filing of the notice. . . . [A] notice of appeal of a final judgment does not bring to the appellate court orders entered after the final judgment unless those orders are also specifically appealed."

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CRIMINAL LAW: EVIDENCE: APPEALS: PRESERVATION: DEFENDANT FAILED TO PRESERVE HIS CHALLENGE TO THE EXCLUSION OF EVIDENCE BECAUSE HE DID NOT PROFFER THE DESIRED TESTIMONY, AND IT WAS NOT APPARENT FROM THE RECORD

Pearlman v. State, ___ So. 3d ___, 40 Fla. L. Weekly D381 (Fla. 4th DCA February 11, 2015)

The defendant was charged with lewd or lascivious battery on a child between the ages of twelve and sixteen years of age. The trial court precluded the defendant from cross examining the victim about "anatomical terminology critical to the elements of the crimes. [The appellate court found] that this issue was not properly preserved, because [the defendant] never proffered the testimony he sought to elicit from the victim and the substance of that testimony [was] not apparent from the record."

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TRUSTS: FAMILY TRUST: CIVIL PROCEDURE: DISCOVERY: NOTICE OF PRODUCTION FROM NON-PARTY: UNDER AMENDMENT TO FLA. R. CIV. P. 1.510, AN OBJECTION TO A NOTICE OF PRODUCTION FROM NONPARTY IS NOT SELF EXECUTING, BUT THE TRIAL COURT MAY BE REQUIRED TO CONDUCT AN IN CAMERA INSPECTION OF DOCUMENTS CLAIMED TO BE PRIVILEGED: PRIVILEGE LOG NOT REQUIRED UNDER RULE 1.510 BUT COURT MAY FASHION PROCEDURAL SAFEGUARDS FOR PRIVILEGED MATERIALS: APPEALS: CERTIORARI: AS A GENERAL RULE, CERTIORARI WILL NOT BE USED TO ADDRESS IRRELEVANT AND OVERLY BROAD DISCOVERY REQUESTS, AND PETITIONER FAILED TO MAKE A SHOWING THAT EITHER OBJECTION APPLIED

Lyons v. Lyons, ___ So. 3d ___, 40 Fla. L. Weekly D383
(Fla. 4th DCA February 11, 2015)

During litigation among the members of a family trust, a notice of production from nonparty was served upon the accountant for the trust. The petitioners objected to the notice based upon privilege, overbreadth, and irrelevance. Although the petitioners contended that their objection was self executing and relegated the respondents to deposing the accountant, the trial court overruled their objections and disregarded their request for an in camera inspection. The petitioners responded by filing a petition for certiorari. After the subpoena for production from non party was issued, the accountant moved for a protective order, and the trial court developed safeguards to protect privileged documents. Although an objection under *Fla. R. Civ. P.* 1.510 may have been self executing when the rule was originally adopted, the rule was amended in 2008 to provide, "If an objection is made by a party under subdivision (b), the party desiring production may file a motion with the court seeking a ruling on the objection or may proceed pursuant to rule 1.310," which provides for depositions upon oral examination. Nevertheless, the trial court still may be required to conduct an in camera inspection if a privilege objection is raised. Although Rule 1.510 does not require the objecting party to file a privilege log, "[t]he trial court has discretion to fashion a process to deal with the production of the documents, and it did in this case." After the "accountant . . . gather[ed] the documents sought by the subpoena," the "petitioners would be entitled to review the documents to segregate those they claimed were privileged. The [trial] court would hold an evidentiary hearing on those claimed to be privileged and conduct an *in camera* review where necessary. This procedure [was] sufficient to protect privileged documents." As a result, the court "denied as moot [the petition] insofar as it [sought] to prevent production of privileged documents without *in camera* inspection." The court dismissed the petition insofar as it sought relief based upon overbreadth and irrelevance because the court usually will not exercise its certiorari jurisdiction to review those objections, and the petitioners in this case failed to show "that the records [were] irrelevant or burdensome to produce."

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TORTS: NEGLIGENCE: PREMISES LIABILITY: SLIP AND FALL: CIVIL PROCEDURE: DISCOVERY: SAFETY COMMITTEE REPORTS: WORK PRODUCT: SAFETY COMMITTEE REPORTS CONSTITUTED WORK PRODUCT AND WERE NOT DISCOVERABLE BECAUSE PLAINTIFF DID NOT SHOW THAT PRODUCTION WAS NECESSARY AND THAT SHE COULD NOT OBTAIN THE SUBSTANTIAL EQUIVALENT WITHOUT UNDUE HARDSHIP; APPEALS: CERTIORARI

Millard Mall Services, Inc. v. Bolda, ___ So. 3d ___, 40 Fla. L. Weekly D384
(Fla. 4th DCA February 11, 2015)

The trial court, in a slip and fall case, overruled the defendant's objection to the production of Quarterly Safety Committee Reports, but the appellate court granted the defendants' petition for certiorari and quashed the trial court's order. The appellate court agreed that the reports constituted work product because they "were prepared in anticipation of litigation." In addition, the plaintiff failed to invoke the exception to the work product privilege by showing

that she needed the reports and was unable to obtain the substantial equivalent without undue hardship. "[D]iscovery directed to defendants. . . . enabled [the plaintiff] to obtain a list of incidents on defendants' premises for three years predating plaintiff's accident, including the dates, times, locations, and a detailed description of those incidents. Therefore, the requested information (or its substantial equivalent) was obtained through means other than the production of work-product materials." "The mere fact that [the safety committee reports] 'might yield additional information about the incident [was] not enough, without more, to show 'undue hardship.'" Judges Damoorgian and Klingensmith concurred in a per curiam opinion. Judge Warner dissented because the reports were prepared to improve safety and, even if they "could be considered work product, . . . section 768.0755, Florida Statutes, . . . should make them discoverable." This statute provides that premises liability in cases involving transitory foreign substances requires constructive notice or foreseeability based upon the regularity of the dangerous condition. In this case, despite the plaintiff's request, the defendants failed to preserve the video of her accident, compromising her ability to establish constructive notice. As a result, she was entitled to discovery of the safety committee reports to establish regularity and foreseeability.

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TORTS: NEGLIGENCE: PREMISES LIABILITY: SLIP AND FALL: CIVIL PROCEDURE: NEW TRIAL: TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING PLAINTIFFS' MOTION FOR NEW TRIAL BASED UPON DEFENDANT'S DESTRUCTION OF EVIDENCE, VIOLATION OF COURT ORDERS, DISCOVERY VIOLATIONS, AND JUROR MISCONDUCT BY CONCEALING LITIGATION HISTORY

Meadowbrook Meat Company v. Catinella, ___ So. 3d ___, 40 Fla. L. Weekly D402 (Fla. 2d DCA February 11, 2015)

The plaintiff alleged that he slipped and fell while unloading a truck at the defendant's facility because of a malfunctioning dock leveler. The jury returned a defense verdict, but the trial court granted a new trial based upon the defendant's destruction of evidence, which resulted in an adverse inference instruction; the defendant's material violation of multiple court orders; the defendant's prejudicial, systematic, material, and willful discovery violations; and the misconduct of two jurors, who failed to reveal their relevant and material prior litigation history. The appellate court affirmed based upon its conclusion that the trial court did not abuse its discretion.

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REAL ESTATE: MORTGAGE FORECLOSURE: SALE: TRIAL COURT VIOLATED DUE PROCESS OF LAW BY SETTING ASIDE FORECLOSURE SALE WITHOUT NOTICE TO BUYER: ORDER SETTING ASIDE SALE REVERSED BECAUSE OF LACK OF NOTICE TO BUYER, INSUFFICIENCY OF OBJECTIONS, AND ABSENCE OF FINDINGS OR EVIDENCE IN RECORD OF MISCONDUCT, DEFECT, OR IRREGULARITY IN SALE

Skelton v. Lyons, ___ So. 3d ___, 40 Fla. L. Weekly D403 (Fla. 2d DCA February 11, 2015)

The appellate court, in a mortgage foreclosure, reversed an order setting aside a judicial sale because (1) due process was violated because the purchaser did not receive notice of the objections to the sale or the hearing on the objections, (2) the objections were insufficient because they did not allege that the sale was unfair or irregular, (3) the trial court did not make any findings, and (4) the record did not contain evidence of misconduct, defect, or irregularity in the sale.

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APPEALS: SANCTIONS: SECTION 57.105, FLORIDA STATUTES: ATTORNEY'S FEES: FRIVOLOUS APPEAL: CIVIL PROCEDURE: RES JUDICATA: CLAIM THAT TRIAL COURT ERRED BY DISMISSING COMPLAINT FOR FRAUD ON COURT WITHOUT CONDUCTING EVIDENTIARY HEARING BARRED BY DOCTRINE OF RES JUDICATA BECAUSE ISSUE WAS DECIDED ADVERSELY TO PLAINTIFF ON APPEAL: CLAIM THAT TRIAL COURT ERRED BY SANCTIONING PLAINTIFF AND HER LAWYER BECAUSE OF ABSENCE OF FINDINGS OF BAD FAITH REFUTED BY RECORD: LAWYER, WHO DID NOT TAKE AN APPEAL, LACKED STANDING TO CHALLENGE TRIAL COURT'S SANCTIONS AGAINST HIM

Faddis v. The City of Homestead, ___ So. 3d ___, 40 Fla. L. Weekly D407

(Fla. 3d DCA February 11, 2015)

"[T]he trial court . . . dismiss[ed] the [plaintiff's] complaint as a fraud on the court" and imposed $166,000 in sanctions, under Section 57.105, Florida Statutes, against the plaintiff and her lawyer. The appellate court affirmed per curiam and sua sponte issued an order to show cause why the plaintiff and her lawyer should not be required to compensate the defendants for having to defend a frivolous appeal. In response, the plaintiff argued that the trial court erred by dismissing her complaint without conducting an evidentiary hearing and that the trial court did not find that she or her lawyer acted in bad faith. The appellate court rejected each of these arguments. (1) The issue whether the trial court erred by dismissing the plaintiff's complaint without conducting an evidentiary was res judicata because it was already decided adversely to the plaintiff in the appeal from the final judgment. (2) The record refuted the argument that the trial court did not find that the plaintiff and her lawyer acted in bad faith. (3) The plaintiff's lawyer lacked standing to challenge the imposition of sanctions against him because he did not appeal from the trial court's order.

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REAL ESTATE: MORTGAGE FORECLOSURE: CIVIL PROCEDURE: CONTINUANCE: APPEALS: RECORD ON APPEAL: BORROWER WAS UNABLE TO ESTABLISH THAT TRIAL COURT ABUSED ITS DISCRETION BY DENYING HIS ORAL MOTION FOR CONTINUANCE BASED UPON HIS LAWYER'S FAILURE TO APPEAR FOR TRIAL BECAUSE OF LACK OF TRIAL TRANSCRIPT, SUBSEQUENT WRITTEN MOTION, WRITTEN ORDER DENYING CONTINUANCE, STATEMENT OF THE EVIDENCE UNDER FLA. R. APP. P. 9.200(b)(4), OR MOTION FOR REHEARING OR RECONSIDERATION

Ramos v. Ventures Trust, ___ So. 3d ___, 40 Fla. L. Weekly D409
(Fla. 3d DCA February 11, 2015)

When the borrower's lawyer failed to appear for the nonjury trial on the lender's action to foreclose on its mortgage, the borrower made an oral motion for continuance. The trial court denied the motion and entered final judgment of foreclosure the next day. The appellate court affirmed based upon the borrower's failure to show that the trial court abused its discretion because the borrower did not provide the appellate court with a transcript of the trial, the borrower did not file a subsequent written motion for continuance, the trial court did not enter a written order on the borrower's oral motion for continuance, the borrower did not file a statement of evidence under *Fla. R. App. P.* 9.400(b)(4), and the borrower did not file a motion for rehearing or reconsideration.

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REAL ESTATE: MORTGAGE FORECLOSURE: CIVIL PROCEDURE: AFTER TRIAL COURT DENIED BORROWER'S MOTION TO SET ASIDE FINAL JUDGMENT OF FORECLOSURE AND DENIED BORROWER'S OBJECTION TO SALE, TRIAL COURT LACKED JURISDICTION TO ORDER CLERK TO WITHHOLD CERTIFICATE OF SALE UNTIL LENDER APPEARED TO EXPLAIN WHY THE MORTGAGE HAD NOT BEEN MODIFIED AND TO DISMISS THE CASE AND DECLARE BORROWER TO BE THE PREVAILING PARTY AFTER LENDER FAILED TO APPEAR

Salazar v. HSBC Bank, USA, NA, ___ So. 3d ___, 40 Fla. L. Weekly D411 (Fla. 3d DCA February 11, 2015)

Seven months after default final judgment of foreclosure was entered against the borrower without post trial motions or an appeal, "[the borrower's] condominium unit was sold and a certificate of sale was filed by the clerk of the court." The borrower objected to the sale and moved to vacate the final judgment because the lender told him not to worry about the foreclosure proceedings while negotiations to modify his loan were taking place. The trial court vacated the sale although the borrower's motion was insufficient. Six months later, the unit was sold again, and the buyer objected and moved to vacate the sale for the same reason as before. Although the trial court denied the objection and motion, it ordered the clerk to withhold the certificate of title until the lender appeared before the court to explain why the loan had not been modified. When the lender failed to appear, the trial court dismissed the foreclosure action and declared the borrower to be the prevailing party for the purpose of awarding attorney's fees. The appellate court reversed. In the absence of a sufficient motion under *Fla. R. Civ. P.* 1.530 to amend judgment or a motion under *Fla. R. Civ. P.* 1.540 for relief from judgment, a trial court lacks jurisdiction to modify a final judgment. "[A]fter the [trial court] correctly rejected [the borrower's] last motion to set aside the final judgment (and denied his objections to the last sale), the [trial court] had no authority [either to] order [the lender] to explain why it had not agreed to renegotiate [the] loan or to dismiss this foreclosure action."

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REAL ESTATE: MORTGAGE FORECLOSURE: CIVIL PROCEDURE: TRIAL COURT LACKED JURISDICTION TO GRANT UNTIMELY MOTION UNDER FLA. R. CIV. P. 1.530 TO VACATE JUDGMENT: COURT REFUSES TO TREAT UNTIMELY RULE 1.530 MOTION AS RULE 1.540 MOTION BECAUSE MOTION DID NOT REFER TO RULE 1.540 OR ANY OF ITS OPERATIVE PROVISIONS

Foche Mortgage, LLC v. CitiMortgage, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D414 (Fla. 3d DCA February 11, 2015)

The trial court in a mortgage foreclosure entered final summary judgment for the defendant based upon the five year statute of limitations. The trial court subsequently granted the plaintiff's motion, under *Fla. R. Civ. P.* 1.530, to vacate judgment and denied the defendant's motion for reconsideration. The appellate court reversed because the plaintiff's motion was untimely under Rule 1.530, and the plaintiff did not appeal. The court refused to treat the plaintiff's untimely Rule 1.530 motion as a 1.540 motion because the plaintiff's motion to vacate did not refer to the rule or any of its operative provisions. As a result, the trial court lacked jurisdiction to grant the plaintiff's motion to vacate judgment.

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TORTS: MEDICAL MALPRACTICE: BIRTH RELATED NEUROLOGICAL INJURY COMPENSATION ACT (NICA): A HOSPITAL WITH PARTICIPATING PHYSICIANS AND THE PARTICIPATING PHYSICIANS BOTH MUST PROVIDE THE NOTICE REQUIRED BY NICA: THE FAILURE TO PROVIDE NOTICE WAIVES NICA IMMUNITY: THE EMPLOYER OF A PARTICIPATING PHYSICIAN IS ENTITLED TO NICA IMMUNITY FOR DIRECT LIABILITY EVEN IF THE EMPLOYEE FAILED TO PROVIDE THE NOTICE REQUIRED BY NICA: THE EMPLOYER OF A PARTICIPATING PHYSICIAN IS NOT ENTITLED TO NICA IMMUNITY FOR THE VICARIOUS LIABILITY OF AN EMPLOYEE THAT FAILED TO PROVIDE THE NOTICE REQUIRED BY NICA; APPEALS: CERTIORARI: THE DENIAL OF SUMMARY JUDGMENT BASED UPON NICA IMMUNITY IS REVIEWABLE BY CERTIORARI BECAUSE NICA PROVIDES IMMUNITY FROM SUIT RATHER THAN MERE IMMUNITY FROM LIABILITY

University of Miami v. Ruiz, ___ So. 3d ___, 40 Fla. L. Weekly D416 (Fla. 3d DCA February 11, 2015)

The plaintiffs' son sustained a serious brain injury because of oxygen deprivation during

delivery in the hospital because of the negligence of two doctors employed by the university. Both the hospital and the doctors participated in the Florida Birth Related Neurological Injury Compensation Act (NICA) and each was required by NICA to provide notice to obstetrical patients of his, her, or its participation. The hospital provided the required notice but the doctors did not. As a result, the hospital was, but not the doctors were not, entitled to NICA immunity. When the trial court denied the university's motion for summary judgment based upon NICA immunity, the university filed a petition for certiorari. The appellate court held that the denial of summary judgment was reviewable by certiorari because NICA provides immunity from suit rather than mere immunity from liability. As a result, the denial of summary judgment, if erroneous, results in irreparable harm because it deprives the movant of the benefit NICA was designed to confer. In deciding the case on the merits, the court was guided by two principles: (1) Because the university was "neither a 'hospital with a participating physician on its staff' nor a 'participating physician," it was not required to provide notice of its participation in NICA. (2) NICA immunity "applies to any person or entity directly involved in the labor and delivery." As a result, the trial court departed from the essential requirements of law to the extent that it denied summary judgment based upon the university's direct liability for the plaintiff's injuries, but the trial court did not depart from the essential requirements of law to the extent that it denied summary judgment based upon the university's vicarious liability for its physician-employees' negligence. Because an employer's vicarious liability is based upon the liability of its employees, if the employees were not entitled to immunity, neither was the employer.

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TORTS: NEGLIGENCE: CONTRACTS: EXCULPATORY CLAUSES: AN EXCULPATORY CLAUSE MAY CLEARLY AND UNEQUIVOCALLY RELEASE A PARTY OF LIABILITY FOR ITS OWN NEGLIGENCE EVEN IF THE CLAUSE DOES NOT EXPRESSLY MENTION NEGLIGENCE: INDEMNITY PROVISIONS ARE DIFFERENT FROM EXCULPATORY CLAUSES AND DIFFERENT RULES APPLY TO EACH OF THEM: CLAUSE EXCULPATING PARTY FROM "ANY LIABILITY WHATSOEVER IN CONNNECTION WITH THE ACTIVITY IN QUESTION AND ANY AND ALL CLAIMS AND CAUSES OF ACTION OF EVERY KIND ARISING FROM ANY AND ALL PHYSICAL OR EMOTIONAL INJURIES AND/OR DAMAGES WHICH MAY HAPPEN TO ME/US CLEARLY AND UNEQUIVOCALLY RELEASED PARTY OF LIABILITY FOR ITS OWN NEGLIGENCE

Sanislo v. Give Kids The World, Inc., ___ So. 3d ___, 40 Fla. L. Weekly S79 (Fla. February 12, 2015)

The defendant was "a non profit organization that provide[d] free 'storybook' vacations to seriously ill children and their families at its resort village." The plaintiff was the mother of a seriously ill child, who applied for a storybook vacation. The plaintiff was injured during the vacation when she was posing for a photograph with her husband and their children while standing on a pneumatic wheelchair lift that collapsed. The trial court denied the defendant's motion for summary judgment based upon an exculpatory clause, but the Fifth District Court of Appeal reversed in an opinion that conflicted with all of the other district courts of appeal.

According to the Fifth District, the word “negligence” is not an essential ingredient in an exculpatory clause releasing a party of liability for its own negligence, but according to the other district courts of appeal it is. The Florida Supreme Court agreed with the Fifth District. The supreme court distinguished cases dealing with indemnity agreements, which do require the express mention of negligence to obtain indemnity of liability for one’s own negligence, because indemnity agreements release a party from liability for injury to an unknown person, and exculpatory clauses release a party of liability for injury to the other party. In this case, the exculpatory clause released the defendant “from any liability whatsoever in connection with the [defendant’s operations]” and applied to “any and all claims and causes of action of every kind arising from any and all physical or emotional injuries and/or damages which may happen to me/us.” The court held that this language clearly and unambiguously released the defendant of liability for its own negligence even though it did not mention the word “negligence.” Justices LaBarga, Perry, Canady, and Polson joined in the per curiam decision of the court. Justice Lewis dissented in an opinion in which Justices Pariente and Quince concurred.

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TORTS: WRONGFUL DEATH: NEGLIGENCE: PREMISES LIABILITY: FAILURE TO PROVIDE SECURITY: CIVIL PROCEDURE: DIRECTED VERDICT: LACK OF FORCED ENTRY INTO VICTIMS’ APARTMENT DID NOT REFUTE CAUSATION AS MATTER OF LAW

Sanders v. ERP Operating Limited Partnership, ___ So. 3d ___, 40 Fla. L. Weekly S85 (Fla. February 12, 2015)

The victims were shot to death in their apartment by an unknown assailant, but there were no signs of forced entry. The owner of the apartment complex, “a national company owning approximately 100 properties,” was allegedly negligent for “failing to: (1) maintain the front gate, (2) have adequate security; (3) prevent dangerous persons from gaining access to the premises; and (4) protect and warn residents of dangerous conditions and criminal acts.” The trial court denied the defendant’s motion for directed verdict, but the Fourth District Court of Appeal reversed, holding that the plaintiff failed to prove causation because of the inability to establish how the assailants gained entry into the apartment. The Florida Supreme Court quashed the Fourth District’s decision. During the three year period before the murders, twenty crimes were committed at the apartment complex; namely, one armed robbery of a tenant while walking from her car to her apartment, one strong-armed robbery of a pizza delivery man, one domestic violence forced entry, nine car thefts, one attempted car theft, one criminal mischief, one burglary of a dwelling, and five burglaries. During the four month period before the murders, the entry gate to the complex was inoperative, but no violent crimes occurred on the property during that period. The tenant who was robbed while walking from her car to her apartment thought that the assailant followed her into the apartment complex. Based on this evidence, the court held that a question of fact for the jury was presented whether a foreseeable danger to residents existed because the defendant failed to prevent criminals from entering onto the premises. “A reasonable jury could have determined that [the defendant’s] failure to maintain the security gate and failure to have the courtesy officer visible probably allowed the assailant(s) to get to the decedents’ door more easily without being detected . . . . Therefore, the lack of forced entry . . . [was] not dispositive of the causation issue.”

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CIVIL PROCEDURE: VENUE: FORUM NON CONVENIENS: TRIAL COURT ERRED BY FAILING TO CONSIDER THE DOCTRINE OF FORUM NON CONVENIENS OR PERFORMING A FLAWED ANALYSIS OF THE DOCTRINE

ILD Corp. v. New Link Network, LLC, ___ So. 3d ___, 40 Fla. L. Weekly D424 (Fla. 2d DCA February 13, 2015)

The defendant moved to transfer venue from Pinellas County to St. Johns Count based upon Section 47.122, Florida Statutes, which adopts the doctrine of forum non conveniens. The trial court denied the motion based upon the premise that the place of payment rule did not apply in this case, but the applicability of this rule was relevant to the propriety, rather than the convenience, of the plaintiff's choice of forum. The appellate court reversed because the trial court either failed to conduct an analysis under Section 47.122 or conducted a flawed analysis by relying upon an irrelevant factor.

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TORTS: NEGLIGENCE: ENGINEERS: TRIAL COURT ERRED BY GRANTING SUMMARY JUDGMENT FOR PROFESSIONAL ENGINEER ON THE GROUND THAT ITS DESIGN PLANS WERE SUPERSEDED BY ANOTHER ENGINEERS DESIGN PLANS BECAUSE THE DATE OF TRANSITION WAS UNCERTAIN: A PROFESSIONAL ENGINEER MAY NOT AVOID LIABILITY FOR NEGLIGENT DESIGN PLANS BASED SOLELY ON THE SIGNING AND SEALING OF A SUBSEQUENT SET OF DESIGN PLANS BY A SUCCESSOR PROFESSIONAL ENGINEER; CIVIL PROCEDURE: SUMMARY JUDGMENT: TRIAL COURT ERRED BY WEIGHING CONFLICTING EVIDENCE; APPEALS: DEFENDANT WHO PREVAILED ON SUMMARY JUDGMENT ON ONE GROUND COULD NOT SEEK AFFIRMANCE BASED ON ALTERNATE GROUND THAT DEFENDANT RAISED BUT TRIAL COURT DID NOT RELY UPON BECAUSE DEFENDANT DID NOT FILE A CROSS APPEAL

Villanueva v. Reynolds, Smith and Hills, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D427 (Fla. 5th DCA February 13, 2015)

The county hired an engineer to prepare the plans for a road expansion project. A fatal accident occurred on the road before the project was completed, and a wrongful death action

was filed against the engineer and the county. Before the accident occurred, the county submitted its own set of signed and sealed plans that changed the speed limit but not the placement of advance warning signals. The trial court granted summary judgment for the engineer based upon its conclusion that "the relevant portions of the Project were constructed using only the succeeding County plans and not the earlier [engineer's] plans." The appellate court reversed because the trial court improperly weighed inconclusive evidence in making its ruling. In addition, the trial court misapplied the law, which does not support the proposition "that a successor engineer's signing and sealing of design plans places full and exclusive responsibility for the plans on the successor engineer. The trial court erred by ruling that [the county engineer] accepted ultimate liability for the Project when he signed and sealed the County plans." The appellate court held that the engineer failed to preserve the right to seek affirmance under the doctrine of *Slavin v. Kay,* 108 So. 2d 462 (Fla. 1958), based upon "the County['s] accept[ance of] the completed Project." Although the engineer raised the *Slavin* defense in the trial court, the trial court failed to rule upon it, thus "impl[iedly] rul[ing] in favor of [the plaintiff] on the issue," and the engineer failed to file a notice of cross appeal.

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INSURANCE: HOMEOWNER'S INSURANCE: SINKHOLE: FLORIDA INSURANCE GUARANTY ASSOCIATION (FIGA): APPEALS: CERTIFIED QUESTION: DOES THE AMENDMENT TO THE DEFINITION OF COVERED CLAIM APPLY TO A CLAIM MADE BEFORE THE DATE OF THE AMENDMENT BUT AFTER THE DATE OF INSOLVENCY

Florida Insurance Guaranty Association, Inc. v. Simmons, ___ So. 3d ___, 40 Fla. L. Weekly D432 (Fla. 5th DCA February 13, 2015)

The Florida Insurance Guaranty Association (FIGA) is responsible for paying the covered claims against insolvent insurers. Section 631.54(3), Florida Statutes, which defines a "covered claim," was amended in 2011. In this case, the Fifth District Court of Appeal certified to the Florida Supreme Court as a question of great public importance whether the amendment to the definition of covered claim applies to a claim made before the date of the amendment but after the date of insolvency.

[Editor's Note: Other cases have held that the definition of covered claim on the date of insolvency controls.]

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CONTRACTS: CONSTRUCTION: CIVIL PROCEDURE: THIRD PARTY COMPLAINT: INDEMNITY: CONTRIBUTION: MOTION TO DISMISS: TRIAL COURT ERRED BY DISMISSING

THIRD PARTY COMPLAINT FOR INDEMNITY AND CONTRIBUTION BY GENERAL CONTRACTOR AGAINST SUBCONTRACTOR BASED UPON ALLEGATION THAT SUBCONTRACTOR PERFORMED THE WORK REQUIRED BY THE SUBCONTRACT BECAUSE THIRD PARTY COMPLAINT ALSO ALLEGED THAT SUBCONTRACTOR BREACHED THE SUBCONTRACT BY FAILING TO PERFORM ITS PORTION OF THE JOB IN A WORKMANLIKE MANNER

Ray Coudriet Builders, Inc. v. R.K. Edwards, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D432 (Fla. 5th DCA February 13, 2015)

The homeowner sued the general contractor for negligently constructing his home, and the general contractor filed a third party complaint for indemnity and contribution against the drywall subcontractor. The trial court dismissed the third party complaint because it alleged that the subcontractor performed his oral agreement with the general contractor, but the appellate court reversed because the third party complaint also alleged that the subcontractor breached the oral agreement by failing to perform his portion of the job in a workmanlike manner. In addition, a home inspection report, "assert[ing] that the drywall work throughout the house was 'very poor,'" was attached to the third party complaint.

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INSURANCE: HOMEOWNER'S INSURANCE: POOL POP OUT: WATER EXCLUSION: COVERAGE DID NOT EXIST FOR DAMAGE CAUSED BY POOL POP OUT BECAUSE OF OPERATION OF WATER EXCLUSION AND ANTI CONCURRENT CAUSE PROVISION: ENSUING LOSS PROVISION WAS INAPPLICABLE; CIVIL PROCEDURE: SUMMARY JUDGMENT

Liberty Mutual Fire Insurance Company v. Martinez, ___ So. 3d ___, 40 Fla. L. Weekly D433 (Fla. 5th DCA February 13, 2015)

The homeowner's pool popped out of the ground because of the hydrostatic pressure created by a tropical storm. The insurer denied coverage based upon an exclusion for "Water below the surface of the ground, including water which exerts pressure on . . . a . . . swimming pool." The homeowner sued the insurer for breach of contract, the parties filed cross motions for summary judgment, and the trial court granted the homeowner's motion based upon the ensuing loss provision of the policy because it "found that the direct cause of the [homeowners'] damage was the pool shell coming out of the ground, rather than the hydrostatic pressure." The appellate court reversed based upon the anti-concurrent cause provision of the policy. An anti-concurrent cause provision excludes coverage for losses caused at least in part by a non-covered cause of loss even if a covered cause of loss contributes to the loss; it applies to "all losses directly and indirectly caused by [events that] are excluded from coverage." Based on the anti-concurrent cause provision, the court found it unnecessary to consider the ensuing loss provision of the policy. An ensuing loss provision creates an exception to an exclusion. "An ensuing loss is a loss that occurs separate from but as a result of an excluded loss. . . . Ensuing loss exceptions are not applicable, however, if the ensuing loss was directly related to the original excluded risk." In this case, the appellate court concluded that the homeowners did not sustain an ensuing loss. "Rather, the policy expressly excluded the [homeowners'] loss as it specifically excluded losses that occurred directly or indirectly from subsurface water pressure. In [the court's] view, the damage . . . resulted directly or indirectly, from subsurface water pressure. Accordingly, [the court found it unnecessary to] look to the ensuing-loss provision."

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This newsletter is prepared by
Joseph S. Kashi of
Sperry & Kashi, P.A.
1776 North Pine Island Road, Suite 324
Plantation, FL 33322

Telephone : (954) 423-6553
Toll-free : 1-877-287-7345
Facsimile : (954) 423-6833

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